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Wednesday, August 9, 2000

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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

MARC and DENISE THORPE,

No. 98-11963

[Debtor](#)  (s).

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MARC and DENISE THORPE,

[Plaintiff](#)  (s),

v.

A.P. No. 00-1031

PROFILE HOLDINGS, INC.,

[Defendant](#)  (s).

_____/

Memorandum of Decision

I. Introduction Debtor Marc Thorpe is a free-lance designer and model maker. About ten years ago, he came up with an idea for a competition involving radio-controlled robots designed to do mayhem to one another in a sort of mechanical cockfight. He called his idea Robot Wars. In 1994, Thorpe entered into a business transaction with Profile Holdings, Inc., whereby Thorpe would become a joint venturer with Profile in Robot Wars; Thorpe was to provide the ideas and Profile the financing. The principal of Profile is Steven Plotnicki, who appears to be almost a caricature of an East-coast entrepreneur: brash, aggressive, combative, and litigious. Thorpe appears to be his exact opposite: West coast reserved, quiet, personable, naive. With the benefit of hindsight, a 50-50 partnership between the two of them had no chance of succeeding. While Robot Wars could not have taken off without Profile's financing, Thorpe became more and more uncomfortable with Profile as a business partner. The essence of whatever success Robot Wars has enjoyed is a small group of dedicated robot builders anxious to compete against each other. Thanks to the Internet, Thorpe was able to build a very personal relationship with them. This personal relationship, and Thorpe's inability to make the builders comfortable with Profile, has resulted in the impasse now before the court. Prior to Thorpe's [Chapter 11](#) filing, he and Profile were locked in litigation in New York. Two tentative settlements of that litigation broke down, and Thorpe was unsuccessful in obtaining court permission to produce a Robot Wars event over Profile's objection. Thorpe then filed a Chapter 11 petition in this court, hoping to use the bankruptcy proceedings to divest Profile of its interest in Robot Wars. In late 1998, the parties again entered into settlement discussions and this time reached a signed agreement. Under the agreement, Thorpe was to receive \$250,000.00 cash and 10% of receipts as royalties. In return, Thorpe agreed to use his best efforts to promote Robot Wars, secure certain rights from robot makers, and use his best efforts to rehabilitate Profile's reputation, which had been severely damaged by litigation. This [adversary proceeding](#) arises out of the 1998 settlement agreement. In the complaint, Thorpe seeks his \$250,000.00, which has never been paid. In its counterclaim, Profile seeks damages from Thorpe for his failure to use his best efforts to rehabilitate its reputation.

II. Determination of Breach Like all good settlements, the agreement Thorpe and Profile reached left neither of them happy. However, based on his concept of "honesty," Thorpe proved utterly incapable of putting on a happy face for the Robot Wars participants. His lukewarm communications with them made it clear that he was not happy with the settlement and considered Profile to be a malevolent force. He really did nothing to quell the strong feeling among the participants that Robot Wars would be much better without Profile.

The court rejects Thorpe's primary contention, that he is excused from performance because Profile did not pay the \$250,000.00. The agreement makes it clear that the parties did not intend immediate payment but rather a structured payment, pursuant to [plan](#), so that tax burdens were minimized. Most tellingly, Thorpe made no demand for payment.

The court further rejects Thorpe's contention that he lived up to his side of the bargain. His agreement did not call for him to be "honest" with the participants; it called for him to bring them back into the Robot Wars fold. If he could not do this in good faith, he should not have made the agreement. He was not free to take Profile's money and then tell the participants that Profile made him do it. That may have been the truth, but it was not what Profile bargained for. Thorpe breached paragraphs 7a and 9 of the agreement.

III. Damages The fixing of damages in this case is very difficult. Profile sought to make it easy for the court, by submitting expert testimony on this issue. However, the expert's opinion is based on the very

flawed premise that Thorpe was capable of rehabilitating Profile's reputation among the robot builders. In fact, exhibits to his own opinion declaration reinforce Thorpe's contention that nothing Thorpe could have said or done would have significantly rehabilitated Profile. By bringing suit against builders, Profile had damaged itself far beyond Thorpe's ability to smooth things over, even if he had done his best. The court perceives that Profile did not take into account the changing times in assessing the value of Thorpe's attempts to rehabilitate it. Even as recently as two or three years earlier, it is very possible that Thorpe's endorsement would have brought most or all of the participants back into the fold. However, the information explosion of the late '90s changed many things, especially among tech-savvy robot builders who are more likely than the general population to take full advantage of e-mail and the Internet. Thanks to these developments, the builders across the world were in constant, instant communication with each other. Information was shared to the extent that a strong anti-Profile sentiment developed in a significant portion of the builder community. Given the extent of their knowledge of the circumstances, it is not surprising that they would correctly view anything Thorpe said or might have said as grudging consideration for a reluctant compromise. Nonetheless, difficulty in assessing damages is not a justification for failure to award them when there has been a breach of a contract. Moreover, Profile certainly did suffer some loss due to Thorpe's failure to deliver. The court must do its best to quantify this loss. Profile's expert testified that the total cost of rebuilding goodwill for Robot Wars was \$677,000.00. It seems appropriate to the court that Profile and Thorpe should bear this cost in relation to the degree that their own actions or failures to act created the need for this rehabilitation. The court finds that even if Thorpe had done everything asked and expected of him, he could not have lessened the strong feelings against Profile by more than a third. Accordingly, the court assesses Profile's damages at \$225,666.67. IV. Conclusion For the foregoing reasons, the court will enter a judgment requiring Profile to pay Thorpe the sum of \$24,333.33, in full satisfaction of its \$250,000.00 obligation to Thorpe. The five-year restrictive covenant contained in paragraph 4 of the settlement agreement shall be extended for one year. All other provisions of the settlement agreement shall remain in full force and effect, including Thorpe's right to royalties. Each side shall bear its own attorneys' fees and costs. This memorandum constitutes the court's findings and conclusions pursuant to FRCP 52(a) and FRBP 7052. Counsel for Profile shall submit an appropriate form of judgment forthwith.

Dated: August 8, 2000

Alan Jaroslovsky

U.S. [Bankruptcy Judge](#) 

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